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Howard J. Symons

Direct Dial 202 434 7305  
hjsymons@mintz.com

July 12, 2000

HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TWB-204  
Washington, D.C. 20554

Re: Ex Parte Presentation  
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling

WT Docket No. 99-263

Dear Ms. Salas:

In accordance with Section 1.1206(b)(1) of the Commission's rules, I am submitting two copies of a letter and the accompanying attachments that I sent today to the Commission staff listed below, on behalf of AT&T Corp and BellSouth Cellular Corp.

Sincerely,



Howard J. Symons

## Attachment

cc: Clint Odom  
Mark Schneider  
Peter Tenhula  
Bryan Tramont  
Adam Krinsky  
Jonathan Pompano

No. of Copies rec'd 0+1  
List A B C D E

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July 12, 2000

Clint Odom, Esq.  
Legal Advisor to Chairman Kennard  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Ex Parte Presentation  
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling

WT Docket No. 99-263

Dear Clint:

Thanks for taking the time to meet with AT&T Wireless and BellSouth recently to discuss WCA's petition for rulemaking. The attached paper summarizes the major points in our filings in this matter.

I am also attaching the rehearing order issued last week by the California appeals court hearing the Ball case. As you will recall, the original order suggested in dicta that restitution might be an available, though "problematic," remedy in misrepresentation cases. In the rehearing order, the Ball court modified its decision to delete this statement in its entirety. In its place, the court stated that injunctive relief would constitute a sufficient remedy and that it expresses no views on the possibility of restitution.

In its final form, the court's order gives no support to WCA's argument that restitution is a permissible remedy. To the contrary, the decision reinforces our position that there is no need for the kind of broad ruling sought by WCA.

Please do not hesitate to call if you would like to discuss these matters further.

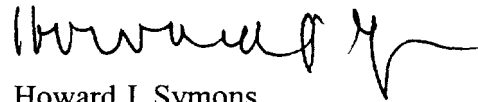
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.

July 12, 2000

Page 2

Pursuant to section 1.1206(b)(1) of the Commission's rules, two copies of this letter are being filed with the Office of the Secretary.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard J. Symons", with a stylized flourish at the end.

Howard J. Symons

Attachments

DCDOCS:175168.1(3RSS01!.DOC)

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July 12, 2000

Mark Schneider, Esq.  
Senior Legal Advisor to Commissioner Ness  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Ex Parte Presentation  
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling

WT Docket No. 99-263

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Dear Mark:

Thanks for taking the time to meet with AT&T Wireless and BellSouth recently to discuss WCA's petition for rulemaking. The attached paper summarizes the major points in our filings in this matter.

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MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.

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July 12, 2000

Peter Tenhula, Esq.  
Senior Legal Advisor to Commissioner Powell  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Ex Parte Presentation  
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling

WT Docket No. 99-263

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Dear Peter:

Thanks for taking the time to meet with AT&T Wireless and BellSouth recently to discuss WCA's petition for rulemaking. The attached paper summarizes the major points in our filings in this matter.

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MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.

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July 12, 2000

Bryan Tramont, Esq.  
Legal Advisor to Commissioner Furchtgott-Roth  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Ex Parte Presentation  
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling

WT Docket No. 99-263

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Dear Bryan:

Thanks for taking the time to meet with AT&T Wireless and BellSouth recently to discuss WCA's petition for rulemaking. The attached paper summarizes the major points in our filings in this matter.

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MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.

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July 12, 2000

Adam Krinsky, Esq.  
Legal Advisor to Commissioner Tristani  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Ex Parte Presentation  
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling

WT Docket No. 99-263

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Dear Adam:

Thanks for taking the time to meet with AT&T Wireless and BellSouth recently to discuss WCA's petition for rulemaking. The attached paper summarizes the major points in our filings in this matter.

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Jonathan Pompano  
Office of Commissioner Powell  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Ex Parte Presentation  
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling

WT Docket No. 99-263

Dear Jonathan:

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**EX PARTE SUBMISSION OF  
AT&T WIRELESS SERVICES, INC. AND BELL SOUTH CORP.  
WT Docket No. 99-263**

1. **The overbroad WCA petition can be summarily denied.** The broad relief requested by WCA in this proceeding -- a ruling that the Communications Act never preempts a state court from awarding monetary damages against CMRS providers for violations of state consumer protection laws or in connection with contract or tort actions -- can and should be summarily denied. There is no question that some claims for monetary relief that arise under state contract, tort, and consumer protection laws are preempted under Section 332(c)(3)(A).

2. **Claims requiring a court to assess the reasonableness of rates or the quality of service are preempted.** If the Commission nonetheless wishes to provide guidance to state courts on the issue of monetary damages, it should rule that Section 332(c)(3)(A) preempts any claim requiring a state court to order monetary relief by assessing the reasonableness of the rate charged in relation to the service provided. To prevent parties from drawing unintended negative implications from such a ruling, the Commission should also explicitly disclaim any suggestion that monetary remedies are otherwise available in all other cases.

3. **Hypothetical examples of "permissible" claims are unnecessary and will only give rise to additional disputes.** The WCA petition provides no basis for trying to define or offer examples of the kinds of claims that are not preempted. Each case necessarily turns on its particular facts and circumstances, all of which can be fully considered by the courts whose function it is to do just that. Hypothetical examples of "permissible" claims for monetary (or injunctive) relief will only give rise to disputes over their meaning and application to particular cases.

4. **There is no valid distinction between a claim based on "nondisclosure" or "misrepresentation" on the one hand, or service quality or billing practices on the other.** Drawing such a distinction is simply an invitation to artful pleading; any claim that there are holes or gaps in coverage can easily be transformed into a claim that "you didn't tell me that there are holes or gaps in coverage."

5. **Courts have consistently preempted tort, contract, and fraud claims that require state courts to regulate the entry or rates of CMRS, whether such claims are couched as challenges to service quality or misrepresentation about service quality.** In Bastien, for example, the Seventh Circuit held that granting the relief sought by the plaintiffs' fraud and misrepresentation complaint would necessarily force the wireless carrier to "provide more towers, clearer signals or lower rates." Similarly, in Ball, a California appellate court upheld the trial court's determination that the plaintiffs' unfair business practices claims were preempted because they presented a direct challenge to the rates charged by the cellular carrier. Significantly, on rehearing (July 6, 2000) the Ball court modified its decision to delete its prior dicta that restitution might be available to address misrepresentation. See also Union Ink Co. v. AT&T Corp. (dismissing misrepresentation claim because it would require court to engage in rate and entry regulation).

6. **The "filed rate doctrine" cases (Central Office, Day, Wegoland) are useful illustrations of how courts have been defining "rate regulation" in the context of judicial monetary awards.** CMRS providers have not asserted that the filed rate doctrine generally applies to them. But a court that is preempted from regulating a wireline carrier's rates because of the filed rate doctrine is also preempted from regulating a wireless carrier's rates under Section 332.

7. **Despite the Congressional decision to preempt some monetary remedies by the enactment of Section 332(c)(3)(A), consumers are not left without a remedy, nor are CMRS carriers free to violate the law with impunity.** Consumers can seek injunctive relief, to the extent permissible under Section 332(c)(3)(A), or rescission of a contract with a wireless carrier. A consumer could also ask a court to enforce contract terms that a carrier has violated (e.g., refund of a separate roaming charge where the contract stated that no such charge would be imposed). In addition, state attorneys general and local law enforcement authorities have the ability to seek substantial civil penalties for violations of the state consumer protection laws. See, e.g., CA Business and Professions Code, §§ 17206, 17536. Finally, Federal law gives consumers a private right of action under Section 207 of the Communications Act.

JUL-27-2000 11:38

P.05/11

Filed 7/6/00

CERTIFIED FOR PUBLICATION

- C O P Y -

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

SUSANNE BALL et al.,

Plaintiffs and Appellants,

v.

GTE MOBILNET OF CALIFORNIA et al.,

Defendants and Respondents.

C031783

(Super. Ct. No. 98AS03811)

ORDER MODIFYING OPINION AND  
DENYING REHEARING  
[NO CHANGE IN JUDGMENT]

## THE COURT:

It is ordered that the opinion filed in this case on June 8, 2000, be modified in the following particulars:

1. On page 22, the first full paragraph beginning with the words, "Through their generically-phrased injunction requests," and ending "with the words, "831 F.2d at pp. 632-634.)" is deleted.

2. On page 22, the first two sentences of the second full paragraph, beginning with the words, "In any event, plaintiffs have alleged" and ending with the words "(injunctive relief and perhaps monetary relief as well)." are deleted.

JUL-07-2000 11:38

P.06/11

3. On page 22, the following language shall be inserted following the words, "disclosure of non-communication time charges"

(nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 et seq.), and a sufficient remedy as part of that action (injunctive relief). (See Comcast Cellular, *supra*, 949 F.Supp. at p. 1201.)

4. On page 22, following the text inserted above, add as footnote 4 the following footnote:

" At this juncture, we express no views on the possibility of restitution as a remedy. (See Comcast Cellular, *supra*, 949 F.Supp. at p. 1201; see and compare Day v. A & T Corp., *supra*, 63 Cal.App.4th at pp. 336-340, with Tenore v. AT&T Wireless SVCS, *supra*, 962 F.2d at pp. 108-115; see also In re Long Distance Telecommunications Litigation, *supra*, 831 F.2d at pp. 632-634.)

This modification does not change the judgment.

The petitions for rehearing by appellants Susanne Ball and Virginia Gordon; and respondents Pacific Bell Mobile Services, Los Angeles Cellular Telephone Company, AirTouch Communications,



JUL-07-2000 11:39

P.07/11

Inc., AirTouch Cellular, Los Angeles SMSA Limited Partnership,  
and Sacramento Valley Limited Partnership are denied.<sup>1</sup>

FOR THE COURT:

\_\_\_\_\_  
RELEASE, Acting P.J.

\_\_\_\_\_  
DAVIS, J.

<sup>1</sup> The denial of Los Angeles Cellular Telephone Company's petition for rehearing includes the joinders by Bay Area Cellular Telephone Company, Cagal Cellular Communications Corporation, Napa Cellular Telephone Company, Salinas Cellular Telephone Company, AT&T Wireless Services, Inc., Stockton Cellular Telephone Company, Sacramento Cellular Telephone Company, Redding Cellular Partnership, Fresno Cellular Telephone Company, Santa Barbara Cellular Telephone Company and Ventura Cellular Telephone Company.

Pages of the opinion, marked to show the court's changes, follow.

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P.03/11

In fact, in *Los Angeles Cellular Telephone Co. v. Superior Court*, *supra*, 65 Cal.App.4th 1013, the lead defendant in the case before us argued successfully that a limitation on liability contained in its PUC-filed tariff applied to it; the relevant tariff in *Los Angeles Cellular* was filed in 1989, the relevant events occurred in 1994, and the preemptive force of section 332(c)(3)(A) was not effective until August 1995. (65 Cal.App.4th at pp. 1016-1017, fn. 3.) What is sauce for the goose is sauce for the gander. A similar analysis applies to the plaintiffs' fifth, sixth, eighth and ninth causes of action for conduct from January 1987 through August 7, 1995. We express no views on the merit of these pre-August 8, 1995 portions of these causes of action. We simply decide that these portions are not preempted by section 332(c)(3)(A).<sup>3</sup>

**3. The Plaintiffs' Challenges to the Defendants' Disclosure of the Rates Being Charged**

The plaintiffs have also alleged that defendants concealed, inadequately disclosed or misrepresented the particular charges

---

<sup>3</sup> We deny the plaintiffs' first request for judicial notice, regarding the pre-August 8, 1995 tariffs filed by certain defendants with the PUC. We have upheld against demurrer the cause of action that alleges these tariffs were violated (the seventh cause of action). Plaintiffs will now be held to their proof.

We have also denied the plaintiffs' second request for judicial notice, which encompassed many of the FCC rulings we have already discussed as well as some advertising materials of the defendants.

JUL-07-2000 11:39

P.09/11

that plaintiffs challenge: rounding-up (second cause of action); billing from "send to end" (third and fourth causes of action); ring time for complete (connected) calls only (fifth and sixth causes of action); overcharging for incomplete calls (seventh cause of action); and "lag time" disconnection (eighth and ninth causes of action). In each of these causes of action, plaintiffs have requested generically-phrased injunctive and restitution relief that can be applied to a nondisclosure claim.

As we have alluded to previously, section 332(c)(3)(A) does not preempt a plaintiff from maintaining a state law action in state court for an alleged failure to disclose a particular rate or rate practice; section 332(c)(3)(A) only preempts a state law action challenging the reasonableness or legality of the particular rate or rate practice itself. (See *Wainberg v. Sprint Corp.* (D.N.J. 1996) 165 F.R.D. 431, 438-439; *In re Long Distance Telecommunications Litigation* (6th Cir. 1987) 831 F.2d 627, 633-634; *DeCastro v. AWACS, Inc.*, *supra*, 935 F.Supp. at pp. 550-551; *Comcast Cellular*, *supra*, 949 F.Supp. at pp. 1199-1201; *Sanderson*, *supra*, 958 F.Supp. at pp. 955-956; *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 328-329, 336-340; *Tenore*, *supra*, 362 F.2d 104, 107, 111-115; *In re Southwestern Bell Mobile Systems, Inc.*, *supra*, F.C.C. 99-356, ¶ 23.) This is because section 332(c)(3)(A) prohibits a state from regulating "the entry of or the rates charged by" any cellular service, but allows a state to regulate "the other terms and conditions,"

JUL-07-2000 11:39

P.10/11

including "customer billing information" and "other consumer protection matters." (See *Tenore, supra*, 962 P.2d at p. 111; see also H.R. Rep. No. 103-111, p. 588.)

~~Through their generically phrased injunction requests, plaintiffs could seek either full disclosure of the challenged charges or to enjoin these charges pending full disclosure. (See *Comcast Cellular, supra*, 949 F.Supp. at p. 1201.) The plaintiffs' generically phrased restitution requests could be justified on the basis of nondisclosure too, though this may be more problematic. (See *ibid.*, see and compare *Day v. AT & T Corp.*, *supra*, 63 Cal.App.4th at pp. 336-340, with *Tenore, supra*, 962 P.2d at pp. 108-115; see also *In re Long Distance Telecommunications Litigation, supra*, 931 F.3d at pp. 632-634.)~~

~~In any event, plaintiffs have alleged a sufficient state law basis for an action (nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 et seq.), and a sufficient remedy as part of that action (injunctive relief and perhaps monetary relief as well).~~ Under our standard of review for a demurrer sustained without leave to amend, there is a reasonable possibility that plaintiffs can allege state law causes of action based on inadequate disclosure of non-communication time charges. <sup>next</sup> Since section 332(c)(3)(A)'s preemptive power does not apply in this disclosure arena, the effective date of section 332(c)(3)(A) in California (August 8, 1995) is irrelevant to these causes of action.

JUL-07-2000 11:39

P.11/11

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(nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 et seq.), and a sufficient remedy as part of that action (injunctive relief). (See Comcast Cellular, *supra*, 949 F.Supp. at p. 1201.).<sup>4</sup>

insert  
p.22

~~4. On page 22, following the text inserted above, add as footnote 4 the following footnote.~~

<sup>4</sup> At this juncture, we express no views on the possibility of restitution as a remedy. (See Comcast Cellular, *supra*, 949 F.Supp. at p. 1201; see and compare *Pay v. A & T Corp.*, *supra*, 63 Cal.App.4th at pp. 336-340, with *Tenore v. AT&T Wireless SVCS*, *supra*, 962 P.2d at pp. 108-115; see also *In re Long Distance Telecommunications Litigation*, *supra*, 831 P.2d at pp. 632-634.)

~~This modification does not change the judgment.~~

~~The petitions for rehearing by appellants Susanto Ball and Virginia Gordon, and respondents Pacific Bell Mobile Services, Los Angeles Cellular Telephone Company, AirTouch Communications,~~